In the

Supreme Court of the United States

OCTOBER TERM, 1977

77-396

No.

VINCENT PACELLI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Vincent Pacelli, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 27, 1977.

OPINION BELOW

The Court of Appeals affirmed the decision of the trial judge on the latter's opinion. The Court of Appeals' order and the District Judge's opinion are contained in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 27, 1977. A timely petition for rehearing was denied on June 15, 1977 (App. C). Jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether a petitioner under 28 U.S.C. §2255 is entitled to a hearing where he alleges without contradition, and supports his allegations with the sworn testimony of witnesses, that the Government obtained his conviction with testimony which it knew at the time to be perjurious.

STATUTE INVOLVED

Section 2255, 28 U.S. Code, provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.****

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial in the Southern District of New York, on June 22, 1965, of conspiring to import narcotics into the United States. He was sentenced to eighteen years in prison and fined $20,000. His conviction was affirmed on appeal, *United States v. Armone,* 363 F. 2d 385 (2d Cir. 1966), and certiorari was denied, 385 U.S. 957 (1966). He began serving his sentence on May 19, 1965 (A. 3).*

The Government's entire case against petitioner was based upon the testimony of one Charles Hedges, previously convicted of importing narcotics, who claimed he made deliveries to petitioner, among others (R. 4.)**

On July 24, 1975, petitioner filed a motion to vacate his conviction and sentence, pursuant to 28 U.S.C. §2255. Relying entirely upon the testimony of Hedges and others in trials subsequent to his, petitioner claimed that the Government had suppressed evidence and knowingly used perjury in obtaining his conviction. Fourteen months later, District Judge Dudley Bonsal denied the petition without a hearing (App. A). Peti-

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* On June 5, 1977 petitioner was released on parole. He remains on parole status until May, 1985.

** Reference is to petitioner's appendix in the Court of Appeals.

tioner appealed from the denial of a hearing. After argument, a panel of the Second Circuit affirmed on Judge Bonsal's opinion (App. B). This petition seeks reversal of that affirmance.

STATEMENT OF FACTS

Prior to petitioner's trial, Charles Hedges was tried in the District of Connecticut for conspiracy to import heroin. The Government's evidence in that case tended to show that Hedges had received shipments of narcotics from couriers in New York and that he had delivered them to one Joe Cahill. Hedges took the stand in his owr defense and denied that he knew Cahill or the Government witness, one Aspelund, an alleged courier. Hedges swore that the first time he saw heroin was in the courtroom (R. 4), The jury convicted him, however, and the court sentenced him to fifteen years. On March 21, 1963, Hedges' conviction was affirmed on appeal. *United States v. Cianchetti*, 315 F. 2d 584 (2d Cir. 1963).

At petitioner's trial, on May 4, 1965, Hedges completely changed his testimony, swearing that he had helped import narcotics for Cahill, Aspelund, and others, including petitioner. His prior testimony, he said, was perjury (R. 4).

Petitioner's §2255 motion, relying entirely on transcripts of trials subsequent to his, alleged a pattern of known perjury and suppression of evidence. Many such items were complained of, but only two will be discussed here.*

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* The other matters petitioner complained of were (1) perjury concerning the existence of tape recordings of Hedges (R. 4), (2) failure to turn over Jencks Act material (R. 5), (3) failure to disclose Hedges' role as informer-provocateur (R. 6), (4) failure to disclose the relationship of Hedges and agent Dugan (R. 6-7), (5) failure to disclose that Hedges didn't implicate petitioner until six months after he began cooperating (R. 9), (6) suppression of evidence of gun charges pending against Hedges at the time he testified (R. 10), and (7) perjury by Hedges concerning a robbery (R. 10).

1. *Known perjury concerning consideration for Hedges' testimony*

Hedges swore at petitioner's trial that he was "offered nothing, promised nothing . . . asked for nothing" (Tr. 1070) and "expected to get nothing" (Tr. 972) for his testimony. Petitioner alleged that this testimony was known by the Government to be perjurious (R. 7). Petitioner relied upon the following evidence, obtained after the trial, which supported the allegation:

(a) James Godwin, Hedges' cousin, testified in a 1969 trial, *United States v. Guante*, 64 CR 828 (SDNY), that when he and Hedges were in jail prior to petitioner's trial, Hedges said that Government agents "told him they would . . . get his sentence reduced from fifteen years to five years" (S.R. 37)*; that "they would get him out, they would give him money, they would give him a car, they would give him anything if he would testify in the case" (S.R. 39).

(b) Godwin's testimony in the aforementioned case that Hedges actually received $3000 from the Government (R. 9, S.R. 37).

(c) Hedges' fifteen year sentence in *United States v. Cianchetti* was reduced by District Judge Timbers on May 15, 1963. According to a statement from Judge Timbers himself, recorded in *United States v. Kahn*, 65 CR 999 (SDNY), in 1966, this came about in part because agent Dugan, the narcotics agent

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* Reference is to petitioner's supplemental appendix below.

in charge of petitioner's prosecution, had secretly told Judge Timbers that the Government would not oppose a ten year sentence cut for Hedges (R. 6, S.R. 32-35).

(d) Agent Dugan testified in *United States v. Guante,* in 1969, that in 1962, while Hedges was appealing his conviction, Hedges lived in an apartment provided him by Dugan, who got him out on bail pending appeal. Dugan frequently visited Hedges there (R. 6).

(e) Hedges, Dugan, and another agent testified in *United States v. Kahn* that from September 1963 through 1964, Hedges was actively engaged as a government informer and provocateur, deceiving his attorney and helping to build a case against her and petitioner. Hedges worked closely in this endeavor with agent Dugan (R. 5-6).

In response, the Government did not dispute any of the facts in (a) - (e). Nor did it deny that agent Dugan was present throughout petitioner's trial and heard Hedges deny any promises or expectations of Government assistance. Nor did the Government deny that the evidence in (a) - (e) was unknown to petitioner at the time of his trial. Rather, the Government claimed that this previously undisclosed evidence of the Government's use of perjury was merely "impeaching," and would not have affected the outcome of the trial (R. 25).

The opinion of the District Judge, upon which the court below relied, *ignored* Godwin's testimony directly contradicting Hedges. Petitioner's claims on this issue, if mentioned at all, were disposed of by the irrelevant rhetoric that they were "either contradicted or not supported by the record" (App. A, p. 3).

2. *Known perjury concerning Hedges' sentence reduction*

Hedges swore at petitioner's trial that he had no conversation with anyone in the Government about a sentence reduction (Tr. 1070); it was just dropped in his lap: "I was offered nothing, promised nothing, and I asked nothing" (R. 6, S.R. 11). Hedges even denied knowing that the Government had not opposed his sentence reduction. He swore that he, on his own, told his attorney to apply for the reduction (S.R. 13b).

Petitioner's motion alleged that this testimony was perjurious and known to be such by agent Dugan, who was present when the testimony was given (R. 7).

Federal narcotics agent Dugan also swore at petitioner's trial that he had not advised Hedges to seek the sentence reduction (Tr. 3333). This, too, petitioner alleged, was perjurious (R. 7).

According to the statement of Judge Timbers, in *United States v. Kahn,* Judge Timbers, after being advised by Dugan that the Government would not oppose a sentence reduction for Hedges, told Dugan to tell Hedges or his attorney to file a motion for reduction (S.R. 34-35).

If Judge Timbers' account was correct, petitioner alleged, then both Dugan and Hedges lied at petitioner's trial. If Dugan did as he was told and advised Hedges to file the motion, then his contrary testimony was perjurious, as was Hedges'. The possibility that Dugan advised Hedges' attorney, but not Hedges, to file the motion was refuted by Hedges' own testimony. According to Hedges, he, not Dugan, told his attorney to file the motion (S.R. 13b).

The perjuriousness of Hedges' and Dugan's denials of any communication concerning the sentence reduction was estab-

lished not only by Judge Timbers' account, but by Godwin's sworn testimony that the Government promised Hedges a sentence reduction (1(a) *supra*), and by the close relationship between Hedges and Dugan during this period, when Dugan got Hedges out on bail (S.R. 40-41), Hedges was living in Dugan's apartment, and Hedges was working for Dugan as an informant-provocateur (R 6-7). That Dugan and Hedges never discussed the sentence reduction during this period is patently preposterous.

In denying a hearing on these allegations. the District Judge merely noted the totally irrelevant fact that Judge Timbers "initiated" the sentence reduction (App. A, p. 3).

REASONS FOR GRANTING THE WRIT

1. *The decision below flagrantly disregards the commands of* §2255 *and of this Court's decisions.*

Petitioner alleged in his §2255 motion the gravest of Due Process deprivations: the knowing use of perjured testimony by the Government, combined with perjurious testimony *of* the Government, *i.e.,* agent Dugan. This perjury had the plain purpose and effect of parading Hedges before the jury as a reformed citizen, testifying solely out of remorse for his own crimes and without hope of reward. In truth and in fact, Hedges — the sole witness against petitioner, who hadn't implicated petitioner until six months after he began cooperating (R. 9) — was promised and received a ten-year sentence reduction, release on bail, an apartment, at least $3000 in cash, and other considerations for his testimony. Such use of known perjury has been condemned by this Court for more than forty years, *Mooney v. Holohan,* 294 U.S. 103 (1935); *Napue v. Illinois,*

360 U.S. 264 (1959); *Giglio v. United States,* 405 U.S. 150 (1972).

Section 2255, 28 U.S. Code, requires that where such constitutional violations are alleged, the court "shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto," unless the motion and the record "conclusively show that the prisoner is entitled to no relief." This Court has repeatedly held that §2255 means what it says. *Fontaine v. United States,* 411 U.S. 213 (1973); *Machibroda v. United States,* 368 U.S. 487 (1962); *Cf. Blackledge v. Allison,* ..... *U.S.* ..... 97 S.Ct. 1621 (1977).

There was nothing in the record or files of the case which established the allegations to be false, "palpably incredible," *Machibroda v. United States, supra,* at 495, or "patently frivolous," *Pennsylvania ex rel Herman v. Claudy,* 350 U.S. 116, 119 (1955), and a hearing was therefore required. In fact, petitioner's allegations were strongly supported by the testimony of James Godwin which, if believed, in itself proved knowing use of and perjury by the Government; by the account of United States District Judge William Timbers,* and by the evidence, previously suppressed, of the assistance and money actually given to the witness by the Government (prior to, during, and after petitioner's trial). A stronger case for a hearing can barely be imagined.

Petitioner's motion, supported as it was by evidence outside the record, was the archetypal case for which §2255 was designed. If a court can dismiss such allegations without an evidentiary hearing, §2255 is vitiated, and a defendant convicted with known perjury is without remedy.

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* Now a member of the United States Court of Appeals for the Second Circuit.

2. *The decision below affords a timely opportunity for this Court to extend Blackledge v. Allison to §2255 petitions raising questions of Constitutional deprivations in the course of trial.*

In *Blackledge v. Allison,* ..... *U.S.* ..... 97 *S. Ct.* 1621 (1977), the Court explicated the procedures a district judge should follow when confronted with a habeas corpus petition wherein the prisoner alleges that, contrary to his statements in a guilty plea proceeding, he had received unkept prosecutorial promises. The Court suggested that in such cases, a full evidentiary hearing is not *always* required. The summary judgment procedure of Fed Rule Civ. Proc. 56 (e), (f) can be invoked, requiring a petitioner, in some cases, to adduce extra-record evidence of his allegations (as petitioner did here, at the outset). This Court also suggested, without elaboration, the employment of magistrates, and pre-trial discovery proceedings, 97 S. Ct. at 1632.

It seems plain to petitioner that *Allison's* guidance applies to §2255 proceedings, and to those which challenge the Constitutionality of trial testimony as well as the voluntariness of a guilty plea. Yet neither the District Court nor the Circuit Court below considered any of the possibilities alluded to in *Allison.* Instead, those courts, like the district court in *Allison,* seemed to believe it is proper to deny a petition summarily whenever it challenges something in the record. If this were the law, of course, no factual issue would *ever* be raised by a habeas corpus or §2255 petition; an evidentiary hearing, the purpose of which is to determine whether the record is false or misleading, would virtually *never* be required.

Petitioner does not deny that habeas corpus and §2255 petitions are a heavy burden on courts; that many, perhaps most, are frivolous. Lower courts need guidance in determining the permissible ways in which their time may be saved in sifting out the plausible petitions from the preposterous ones; and in expeditiously determining factual disputes. But summary denial in implicit reliance upon a conclusive presumption that Government wtnesses and Government agents never commit perjury is not the answer.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted. Alternatively, petitioner suggests that the decision of the court below should be summarily vacated and remanded in light of *Blackledge v. Allison,* ..... *U.S.* ....., 97 S.Ct. 1621 (1977), which was decided after the decision below.

Respectfully submitted,

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Counsel for Petitioner

APPENDICES

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VINCENT PACELLI,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

75 Civ. 3624 (PRSE)
(54 Cr. 828)

#45054

MEMORANDUM

BONSAL, D. J.

Petitioner, Vincent Pacelli, nearly eleven years after the jury trial on Indictment 64 Cr. 828, moves pursuant to 28 U.S.C. §2255 for an order vacating his conviction and sentence on the ground that his conviction was secured by the Government's use of perjury and suppression of impeachment evidence in violation of his constitutional rights. Petitioner also seeks bail pending determination of his Section 2255 motion.

Petitioner, along with eleven other defendants, was charged in Indictment 64 Cr. 828 with conspiracy to violate the federal narcotics laws, specifically, sections 173 and 174 of Title 21 of the United States Code. Following a seven-week jury trial, petitioner was convicted on June 22, 1965 and sentenced on July 29, 1965 to eighteen years imprisonment and a $20,000 fine. The judgment of conviction was affirmed on appeal and certiorari was denied by the

Supreme Court of the United States. United States v. Armone, 363 F.2d 385 (2d Cir.), cert. denied, Viscardi v. United States, 385 U.S. 957 (1966).

On November 8, 1965, Indictment 65 Cr. 999 was filed charging petitioner and two others with conspiracy to obstruct justice and suborn perjury in violation of 18 U.S.C. §371. Following a declared mistrial, a second trial was commenced before Judge McLean in February, 1966, and on March 9, 1966, petitioner was convicted by a jury of the crimes charged. Petitioner's conviction was affirmed on appeal, United States v. Kahn, 366 F.2d 259 (2d Cir.), cert. denied, 385 U.S. 948 (1966), and on March 30, 1966, petitioner was sentenced to two years imprisonment on both counts to run concurrently, but consecutive to the sentence imposed on him in the Armone trial.

In his moving papers, petitioner contends that: (1) certain materials, including tape recordings of certain conversations between the Government witness, Charles Hedges, and an attorney, Frances Kahn, were withheld from the defense in violation of 18 U.S.C. §3500 and Brady v. Maryland, 373 U.S. 83 (1963); (2) that the Government relied on Hedges' false testimony at the trial and the false testimony of Agent Thomas Dugan of the Federal Bureau of Narcotics and Dangerous Drugs regarding the taped conversations between Hedges and Kahn; and (3) that the Government suppressed evidence of Hedges' role as informer-provocateur and of his close relationship with Agent Dugan involving alleged offers by the Government to help Hedges obtain a reduction of his sentence in return for his

cooperation.

The Court was aware at the time of petitioner's trial that the Government was conducting an investigation with the assistance of Agent Dugan to determine whether or not petitioner was seeking to obstruct justice by sending Kahn to visit Hedges in the Westchester County Jail and to urge him not to testify at petitioner's trial and to repudiate his prior statements to the Government. While this investigation had no immediate relevance to the narcotics conspiracy for which petitioner was being tried at the time, petitioner's counsel was made aware of the investigation and given the opportunity to examine the materials, including tape recordings (transcript of U.S. v. Armone, 64 Cr. 828, at 923-26). Neither Pacelli's attorney nor any of the other defense attorneys chose to use any of this material as it would have obviously been seriously damaging to their clients' interest.

As to petitioner's contention that the Government suppressed evidence of its offer to help Hedges secure a reduction of his sentence, it is clear that Judge Timbers, who presided at Hedges' trial, initiated it following the affirmance of Hedges' conviction by the Court of Appeals. (Transcript of United States v. Kahn, 65 Cr. 999 at 1410-13).

In reviewing petitioner's other contentions concerning subornation of perjury by Agent Dugan and Hedges, the Court finds petitioner's allegations are either contradicted or not supported by the record. Furthermore, petitioner's contentions as to the suppression of evidence, even if taken as true, do not appear to meet the

standard of constitutional error as recently enunciated in United States v. Agurs, ___U.S.___, 44 U.S.L.W. 5013 (June 24, 1976).

Since petitioner's motion is without merit and is void of support in the trial record or in the affidavits submitted to the Court, the motion is denied without a hearing. 28 U.S.C. §2255; See, United States v. Romano, 516 F.2d 769, 771 (2d Cir. 1975); Williams v. United States, 481 F.2d 339, 345 (2d Cir.), cert. denied, 414 U.S. 1010 (1973).

It is so ordered.

Dated: New York, N.Y.
September 8, 1976

Dudley R. Bonsal
U. S. D. J.

UNITED STATES COURT OF APPEALS APPENDIX B

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of April, one thousand nine hundred and seventy-seven.

P R E S E N T:

HON. THOMAS J. MESKILL, Circuit Judge

HON. CONSTANCE BAKER MOTLEY, District Judge*

HON. CHARLES L. BRIEANT, JR., District Judge*

VINCENT PACELLI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

76-2147

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Bonsal below.

Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

Constance Baker Motley, U.S.D.J.

Charles L. Brieant Jr.
Charles L. Brieant, Jr., U.S.D.J.

* Of the Southern District of New York, sitting by designation.

Appendix C

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of June , one thousand nine hundred and seventy-seven.

Present:

HON. THOMAS J. MESKILL,

Circuit Judge,

HON. CONSTANCE B. MOTLEY,

HON. CHARLES L. BRIEANT,

District Judges.
~~Circuit Judges.~~

Docket No. 76-2147

VINCENT PACELLI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. Daniel Fusaro

A. DANIEL FUSARO
Clerk